Supreme Court, U.S.
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No.____

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In the Supreme Court of the United States

NORRIS McCRARY

Petitioner,

v

CAROLYN COMSTOCK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A State actor is entitled to qualified immunity unless his conduct violated a constitutional right that was clearly established at the time of the alleged injury. *Saucier v. Katz*, 533 U.S. 194 (2001). To establish an Eighth Amendment violation for a failure to provide medical care, a prisoner must establish that the prison official acted with deliberate indifference. *Estelle v. Gamble*, 429 U.S. 97 (1976). Deliberate indifference requires that "[A] prison official . . . knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

Prison psychologist McCrary initially placed prisoner Montgomery on suicide watch on March 2, 1995, and then subsequently removed him from suicide watch on March 3, 1995 after speaking with Montgomery and determining he was no longer suicidal. Mr. Montgomery committed suicide in his cell on March 3, 1995 after being removed from suicide watch.

Did the Court of Appeals err in denying qualified immunity on the basis that Mr. McCrary's actions constituted deliberate indifference?

LIST OF PARTIES TO PROCEEDING IN COURT BELOW

Dr. V. S. Thyagarajan and David Howell, a physician's assistant, were initially named as defendants. Claims against them were dismissed by the Court of Appeals and Petitioner McCrary believes they have no interest in the outcome of his petition. S Ct Rule 12.6.

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OPINIONS BELOW

The December 12, 2001 opinion of the Court of Appeals is reported at 273 F.3d 693 (6th Cir. 2001), and is reprinted in the Appendix to this Petition, App. pp 1a-31a. The prior opinions of the United States District Court for the Eastern District of Michigan entered on July 6 and August 16, 1999, are not reported, and are reprinted in the Appendix to this Petition, App. pp 33a-38a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on December 12, 2001. On February 15, 2002, the Court of Appeals issued its Order denying McCrary's Petition for Rehearing *En Banc.* Pet. App. 39a-40a.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend VIII provides that:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This case involves the suicide of Billy Wade Montgomery on March 3, 1995, at the Michigan Department of Corrections' (MDOC) Reception and Guidance Center (RGC) in Jackson, Michigan. He arrived at the RGC on February 22, 1995. Mr. Montgomery was waiting to be sent to another facility operated by the MDOC.[1] At the time, he was incarcerated because he had three drunk-driving convictions. Prior to coming to RGC, he had been incarcerated in a county jail since June 28, 1994.

The Respondent is Norris McCrary, a psychologist at RGC. There were other parties to his lawsuit, Dr. V.S. Thyagarajan, and David Howell, a physician's assistant at RGC. The claims against Dr. Thyagarajan and Mr. Howell were dismissed by the Court of Appeals.

Mr. McCrary first came into contact with Mr. Montgomery on March 2, 1995, at approximately 10:55 a.m., in response to a referral from a Corrections Officer who had observed Mr. Montgomery acting despondently in his cell. After speaking with Mr. Montgomery at his cell, Mr. McCrary noted in Montgomery's medical records "[F]eels like he's going to die." He also noted "Currently inmate reports feeling suicidal, but with no specific plan. Lethality appears to be moderate."

Following that initial conversation with the Plaintiff, Mr. McCrary recommended, at 11:30 a.m. that same day, that Mr. Montgomery be placed on close observation and dressed in a suicide gown. He also recommended that all sharp objects should be removed and that the Plaintiff's diet should be restricted to finger foods, that he should be watched every ten minutes, and that he should be seen by the Outpatient Mental

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[1] All male inmates, twenty-one years old and over, are initially processed through RGC and, once they have been processed to determine appropriate programming, security level, health care needs, etc., they are sent to another MDOC facility where they will be housed.

Health Team. When Plaintiff's counsel asked him at his deposition whether he felt that Mr. Montgomery was suicidal on March 2, 1995, Mr. McCrary stated:

> I didn't feel Mr. Montgomery was genuinely suicidal, sir, because again, Mr. Montgomery did not give me a specific plan as to how he would go about it. You know, he didn't - he didn't say that he planned on cutting his wrists, or planned on doing something else. He just made a vague - he made a statement. It feels like - it feels like I'm going to die. But that's not the same thing to me as I'm going to kill myself.

On March 3, 1995, at 9:45 a.m., Physician's Assistant Howell conducted a fifteen to twenty minute physical examination of Mr. Montgomery. Mr. McCrary's notes from the previous day were not in Mr. Montgomery's file at that time. Mr. Howell made a notation in Mr. Montgomery's medical file which stated "Patient seen in 'Bam-Bam' suicide prevention garment . . . states that he is not depressed and has no thoughts of self-harm. States that his main problem is that other inmates have threatened to kill him because they believe he is a 'snitch' - - stated he had thoughts of dying in order to get locked down in safe area. No psychotic signs/symptoms noted." Mr. Howell did not report to Mr. McCrary, or anyone else for that matter, that Mr. Montgomery had been labeled a snitch.

During the course of the physical examination, Mr. Howell had an opportunity to speak with Mr. Montgomery. Mr. Montgomery told him he was not suicidal. Mr. Howell stated:

> He (Mr. Montgomery) denied to me that he was suicidal. I mean, he was relating to me a rational process for moving from one part of the

> prison facility to another part of the prison facility. And he was very adamant about the fact that he was not suicidal. [Defendant Howell's deposition; p. 69]. App. pp 45a-46a.

Later on in the deposition Mr. Howell indicated that "The circumstances that he outlined to me indicated that he was looking towards the future." Mr. Montgomery was no different than thousands of inmates that he had seen. Mr. Montgomery seemed like a rational person to him.

On March 3, 1995, at approximately 10:13 a.m., Mr. McCrary met with Mr. Montgomery at his cell. Mr. McCrary did not speak with Mr. Howell about Mr. Montgomery. Mr. McCrary spoke with Mr. Montgomery for about a half an hour at his cell door. At that time, he believed that Mr. Montgomery was no longer suicidal. When asked by Plaintiff's counsel about Mr. Montgomery's condition on March 3, 1995, Mr. McCrary responded:

> I don't really -- I can't recall him saying that. All I can tell you, sir, is when I saw Mr. Montgomery on the 3rd of March, my main concern was, was he still fairly suicidal or not. And I still again asked him if he had a problem with any of the other prisoners, which he told me no. And he said he was not feeling suicidal, that he didn't feel like he was going to die. I asked him some other questions to ascertain his mental status, just to make sure he was okay. He seemed to be fine, and knew that he was going to go back up to top six. I don't recall him saying any statements that he was tired of being in a bam-bam suit or tired of the finger foods or anything like that. [Defendant McCrary's deposition, p. 187]. App. pp 41a-44a.

At that point, on March 3, 1995, Mr. McCrary recommended that Mr. Montgomery be taken off observational

status. Mr. Montgomery was moved from an observational cell to an area called Top Six which is the top gallery of Cell Block Six at RGC.

On March 3, 1995, at approximately 4:29 p.m., the Plaintiff committed suicide in his cell. He committed suicide by hanging himself by a rope fashioned from his bed sheet. Mr. Montgomery left a suicide note to his girlfriend which read "I love you Cindy, and I always will. I am sorry, but I couldn't let them do it to me. Please forgive me. I will always be with you. Love, always and forever."

Carolyn Comstock, the personal representative of Mr. Montgomery's estate, filed the initial Complaint on September 19, 1997. The initial Complaint only named Norris McCrary as a party. Ms. Comstock subsequently filed an Amended Complaint naming David Howell and Dr. Thyagarajan as parties.

The Amended Complaint asserted that McCrary, Howell and Thyagarajan violated Mr. Montgomery's rights under the Eighth Amendment. The amended complaint alleged that they were deliberately indifferent and that they failed to protect Montgomery from harm. The amended complaint also contained a supplemental state law claim for gross negligence.

The District Court granted McCrary, Howell and Thyagarajan's motion to dismiss Comstock's failure-to-protect claim. The Court denied their summary judgment motion as to the deliberate indifference claim and the supplemental state law claim.

On August 4, 1999, the Court of Appeals released its opinion in *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999). McCrary, Howell and Thyagarajan then filed a motion for summary judgment based on qualified immunity in light of the Court of Appeals' holding in *Williams, supra.*

The District Court held a hearing on October 25, 1999, and denied the Defendants' dispositive motion based on qualified immunity after the hearing.

McCrary, Howell, and Thyagarajan subsequently filed their appeal on November 23, 1999.

On December 12, 2001, the Court of Appeals affirmed in part and reversed in part the District Court. The Court of Appeals reversed the District Court as to the Federal claims against Howell and Thyagarajan and granted them qualified immunity. The Court of Appeals affirmed the District Court as to McCrary and denied him qualified immunity. Finally, the Court of Appeals declined to decide the state law claim against McCrary, Howell, and Thyagarajan.

On December 20, 2001, Mr. McCrary, Mr. Howell, and Dr. Thyagarajan filed a petition for rehearing and rehearing *en banc*. The Court of Appeals denied that request on February 15, 2002.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the holding of the Court of Appeals is in direct conflict with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994).

McCrary maintains that he is entitled to qualified immunity from money damages. Government officials are entitled to qualified immunity when their actions do not violate clearly established constitutional rights. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court of Appeals' analysis of qualified immunity is fundamentally flawed because it fails to properly examine the existence of a constitutional violation. Instead it impermissibly equates the constitutional standard for deliberate indifference with the tort standard of negligence. Certiorari should be granted to prevent perpetuation of the Court of Appeals' error in other cases.

This Court recently reaffirmed the standard for evaluating claims based on qualified immunity. In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court focused on what the critical initial inquiry must be:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley*, 500 U.S. 226, 232; 114 L.Ed.2d 277; 111 S.Ct. 1789 (1991).
>
> * * *
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning

qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

This Court should grant certiorari because the holding of the Court of Appeals is in direct conflict with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994).

A. Mr. McCrary's actions did not violate Mr. Montgomery's constitutional rights under the Eighth Amendment.

Deliberate indifference is the standard for evaluating claims by prisoners that prison officials have failed to provide medical care that comports with the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994). Deliberate indifference requires a state of mind more blameworthy than negligence. *Farmer, supra*, at 835. The test for deliberate indifference is a subjective test which requires that:

> [T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference. [*Id.*, at 837.]

Under the facts of the instant case, Ms. Comstock has not established that Mr. McCrary acted with deliberate indifference. Ms. Comstock has done nothing more than set forth facts which might amount to a state law claim for medical malpractice.

This Court further defined deliberate indifference in *Farmer* in holding:

> We hold instead, that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts

> from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference.

This Court continued:

> [P]rison officials who actually know of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety." [*Id.*, at 844.]

Mr. McCrary's actions were reasonable under the circumstances. He talked to Mr. Montgomery twice and exercised his professional judgment. Consequently, Mr. McCrary could not have committed a constitutional violation. The Court of Appeals erred by even examining whether Mr. Montgomery's rights were clearly established.

It is important for this Court to keep in mind that Mr. Montgomery was under constant observation by prison personnel during the time he was incarcerated at RGC. Mr. McCrary initially observed Mr. Montgomery and believed that he exposed some suicidal indication on March 2, 1995. At that point, Mr. McCrary placed Mr. Montgomery on suicide watch, had him placed in a suicide gown and placed on a soft food diet. The next day, he spoke with Mr. Montgomery. Mr. Montgomery informed him that he was not and had not been suicidal. Relying on that information, Mr. McCrary moved him from observational status to administrative segregation. Mr. McCrary trusted his patient and removed him from suicide watch. Obviously, in hindsight, that decision was incorrect. It did not, however, amount to deliberate indifference. Significantly, Mr. McCrary did not simply send Mr. Montgomery back to general population. Mr. Montgomery was still housed in administrative segregation, in a single cell,

when he committed suicide on March 3, 1995. He was still under close, though less intense, observation.

The Court of Appeals' opinion focused on what McCrary could or should have done. For example, he could have asked custody officers about Montgomery's behavior. That is the wrong test under *Farmer* and *Estelle*. In *Farmer*, this Court noted:

> [A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment. [*Farmer, supra*, at 838.]

Rather, the Court of Appeals should have focused on what Mr. McCrary knew on March 3, 1995, when he released Mr. Montgomery from suicide watch. At that time, he believed Mr. Montgomery was no longer suicidal.

Essentially, the Court of Appeals has equated the deliberate indifference standard set forth in *Estelle* and *Farmer*, to a negligence standard.[2] The Court of Appeals concluded that the testimony of others, including Ms. Montgomery's expert, Dr. Gerald Sheiner, established deliberate indifference. In truth, it did nothing more than raise a question of negligence. The Court of Appeals' decision undermines *Estelle* and *Farmer* because it equates state law negligence with deliberate indifference.

Neither Dr. Sheiner's testimony, nor the testimony of Dr. Walsh, an MDOC psychologist, speaks to the subjective element of Eighth Amendment claims. The Court of Appeals accepted Dr. Sheiner's and Dr. Walsh's testimony as defining Mr. McCrary's state of mind. Neither of them is capable of testifying as to Mr. McCrary's state of mind. It was incorrect

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[2] Recently, the Court of Appeals went so far as to hold that "grossly inadequate medical care" was the equivalent of deliberate indifference. *Terrence v. Northville Regional Psychiatric Hospital*, __ F.3d __ (6th Cir. 2002); 2002 U.S. App. LEXIS

for the Court of Appeals to place such reliance on their testimony to satisfy the subjective element of an Eighth Amendment claim.

The evidence submitted to the District Court and the Court of Appeals does not establish that Mr. McCrary knew that a substantial harm would result from his actions. Even if every aspect of Dr. Sheiner's testimony is true, it does not satisfy the subjective element of an Eighth Amendment claim. Not noticing that an inmate exhibits a serious medical need is not a constitutional violation because not noticing that a need exists is not considered "punishment." *Farmer, supra*, at 837-38.

If the Court of Appeals' opinion is allowed to stand then there will be no difference between a constitutional claim for deliberate indifference and a state law claim for medical malpractice. The Court of Appeals will have a published decision that will be cited by future litigants that directly conflicts with this Court's cases regarding deliberate indifference dating back to 1976. It is essential that litigants, especially mental health professionals, willing to work in prisons know, in advance, what legal standards are going to govern their conduct in a most difficult setting. The majority's decision effectively destroys the viability of *Estelle, supra* and *Farmer, supra*. Litigants now will be put in the position of having to cite a case that clearly conflicts with this Court's precedent.

There is no principled way to distinguish the instant case from *Estelle*. In both cases, a prisoner was provided medical care. Unfortunately, the medical care given did not prevent Mr. Montgomery from committing suicide. *Estelle* is directly on point. In *Estelle*, this Court held that once a medical professional has provided some medical treatment and exercised his professional judgment, he cannot be found to be deliberately indifferent. When a prisoner receives the amount of medical care that Mr. Montgomery received in the case at bar, administered by a professional who exercised his judgment, there cannot be a constitutional violation. Thus,

under *Saucier*, the Court's inquiry should have been over. No reasonable prison psychologist in 1995 could have known that once he had exercised his professional judgment he could be constitutionally liable for damages for "cruel and unusual punishment."

In *Estelle, supra*, at 105, this Court concluded:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency." [Emphasis added.]

This Court noted that the inmate in *Estelle* was seen by medical personnel seventeen times. While Mr. McCrary only met with Mr. Montgomery on two occasions, he talked with him at length both times. Additionally, as noted above, when released from suicide watch, Mr. Montgomery was placed in administrative segregation, and was observed by corrections officers twenty-four hours a day in at least half-hour intervals his entire stay in administrative segregation. Under those circumstances, Mr. McCrary's conduct could not amount to a constitutional violation and thus, he is entitled to qualified immunity under *Saucier, supra*.

In a case similar to the case at bar, the Seventh Circuit granted summary judgment to two physicians who failed to prevent a prisoner's suicide because they exercised their medical judgment in their treatment of him. *Sanville v. McCaughtry*, 266 F.3d 724 (7th Cir. 2001). In *Sanville*, the Court of Appeals rejected the claim that a physician's failure to prevent even possible harm might amount to deliberate indifference. Rather, the Court of Appeals concluded that a physician's exercise of his medical judgment could not amount to an Eighth Amendment violation, even if, in hindsight, his decision turned out to be incorrect. *Id.*, at 737. The Court commented, "Although we wish Dr. Pareek could have prevented Matt's suicide, physicians do not practice with a crystal ball in hand." *Sanville, supra*, at 736.

Similarly, in a suicide case involving a pretrial detainee, the Fifth Circuit upheld a district court's decision to grant summary judgment to a county sheriff. *Flores v. County of Hardeman, Texas,* 124 F.3d 736 (5th Cir. 1997). Initially the sheriff, Chester Ingram, placed Flores in an observation cell where he was checked on at least every half-hour. The sheriff also prohibited the issuance of inmate supplies which an inmate could use to harm himself. The sheriff kept those procedures in place for twelve hours. At that time, Ingram believed that Flores was no longer in danger of committing suicide. Flores committed suicide within hours of Ingram's decision to remove him from observational status. In affirming the district court's decision to grant summary judgment, the Fifth Circuit held:

> While it is easy in hindsight to conclude that Ingram's decision to discontinue the protective measures after twelve hours was ill advised, it was not, as a matter of law, deliberately indifferent. [*Flores, supra*, at 738.]

The Court of Appeals' decision is in conflict with decisions of other circuits as well. For example, the Third Circuit has held:

> If a Plaintiff's disagreement with a doctor's professional judgment does not state a violation of the Eighth Amendment, then certainly no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness. [*White v. Napoleon*, 897 F.3d 103, 110 (3rd Cir. 1990).]

The Fifth Circuit held in another case involving medical treatment that the opinion of the plaintiff's expert witness was not enough to create a material issue of fact. *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999)(upholding the District Court's decision to grant summary judgment to two physicians despite the affidavit of the Plaintiff's expert because the Plaintiff did not satisfy the subjective element of *Farmer* and *Estelle*). The facts in *Stewart* parallel those in the case at bar. A prisoner's estate brought a claim against four physicians for deliberate indifference. The prisoner suffered from ulcers on his back beginning in August of 1994. A prison physician, Dr. Dial, ordered that the ulcer be treated with antibiotics. A second doctor subsequently ordered that the dressings should be changed two to three times a day. The second doctor, Dr. Kim, ultimately referred the prisoner to a Dr. Wright at a non-prison hospital. Upon his return to prison, Dr. Kim did not follow Dr. Wright's directive that the prisoner should be transferred to a different facility. Rather, Dr. Kim ordered that the prisoner should be kept out of bed as much as possible and that nurses should move his extremities. A third physician, Dr. Knutson, took over from Dr. Kim and periodically checked the prisoner's wounds and ordered that the prisoner get out of bed for extended periods of time. Dr. Knutson never prescribed antibiotics for the ulcers. On November 30, 1994, Dr. Knutson

admitted the prisoner to a non-prison hospital. The admitting physician testified it was the worse case of ulcers he had ever seen. The prisoner died on December 7, 1994 due to the ulcers.

The Court of Appeals concluded the prisoner did not have a valid Eighth Amendment claim under *Estelle* or *Farmer*. Since the physicians had actively treated the prisoner's medical condition, the prisoner's claim failed. *Stewart, supra*, at 537.

B. Mr. McCrary did not act in violation of clearly established law.

In *Harlow*, this Court held:

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. [*Harlow, supra*, at 818.]

A court should only proceed to determine whether a right is clearly established if, and only if, there has been a constitutional violation. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Even if this Court determines that Mr. McCrary could have violated Mr. Montgomery's rights under *Farmer* and *Estelle*, Mr. McCrary certainly did not act in violation of clearly established law.

Ms. Comstock simply suggested alternate methods of care. Whether Mr. McCrary could have performed additional tests which might have prevented Mr. Montgomery's suicide is not relevant in determining deliberate indifference.

The Court of Appeals' Opinion is also in direct conflict with the Eighth Circuit's opinion in *Yellow Horse v.*

Pennington County, 225 F.3d 923 (8th Cir. 2000). The Eighth Circuit stated the facts as follows:

> Alan Ray Yellow Horse's decedent, his brother Frederick Yellow Horse (Yellow Horse), served a thirty-day sentence for DUI in the Pennington County Jail. He was then transferred to the Human Services Center in Yankton for alcohol treatment. On August 24, 1994, one day before his discharge from the Human Services Center and transfer back to the county jail, Yellow Horse attempted to commit suicide by cutting his wrist with a sharp object. Yellow Horse was transferred back to Pennington County Jail the next day, and was placed on a suicide watch. Yellow Horse was removed from the suicide watch on August 27, returned to suicide watch on August 28, and was placed in a less secure area of the jail when he was again removed from suicide watch on August 29. Both times Yellow Horse was removed from suicide watch, Officer Peggy Severson decided to take Yellow Horse off suicide watch without consulting a mental health expert and without completing a suicide screening form. On September 6, 1994, two inmates alerted Deputy Jill West to problems in Yellow Horse's cell. When West unlocked Yellow Horse's cell, she discovered Yellow Horse had hanged himself. West performed CPR to no avail, and Yellow Horse was later pronounced dead at the hospital.

The Court of Appeals affirmed the District Court's decision to grant qualified immunity. As in the instant case, the estate complained that Severson should have taken certain actions prior to removing Yellow Horse from suicide watch. The panel held under *Farmer* that merely citing things that

Severson should have done did not establish deliberate indifference. Severson's actions did not violate clearly established law.

Six years after *Estelle*, this Court held, "[T]he Constitution only requires that the Courts make certain that professional judgment, in fact, was exercised. It is not appropriate for the Courts to specify which of several professionally acceptable choices should have been made . . ." *Youngberg v. Romero*, 457 U.S. 307, 321 (1982).

Moreover, in *Farmer, supra,* at 844-845, this Court held:

> [P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety," (citations omitted) a standard that incorporates due regard for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions." (Citations omitted). Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.

Clearly, under the circumstances, Mr. McCrary acted in a reasonable manner. He initially diagnosed Mr. Montgomery as being suicidal. The next day, he spoke with and observed Mr. Montgomery and determined he could be removed from observational status. No prison official in 1995 could have known that taking such actions violated the constitution.

Mr. McCrary properly exercised his professional judgment. Ms. Comstock simply disputes the adequacy of the treatment.

The Court of Appeals decision is also contrary to an earlier *en banc* opinion of the Court of Appeals. *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999). In *Williams, supra*, the Court held under similar circumstances that mental health professionals were entitled to qualified immunity. The decedent, a Michigan prisoner, in *Williams*, had threatened to commit suicide on several occasions. He ultimately succeeded by overdosing on the anti-depressant Sinequan. Several doctors treated the decedent over a period of several months. The decedent often said he was suicidal and then would say he was not.

Rather than adopting a standard that is in direct conflict with Supreme Court and Court of Appeals precedent requiring a subjective standard for Eighth Amendment claims, the panel in the present case should have concluded Mr. McCrary was entitled to qualified immunity. No reasonable prison physician could have known that a prisoner could state a claim under the Eighth Amendment without satisfying the subjective element of *Farmer*. No reasonable prison psychologist in 1995 could have known that once he had exercised his professional judgment he could be liable for damages for a constitutional violation. The case at bar is so factually similar to *Estelle* and *Farmer* that this Court must reverse the Court of Appeals decision and hold that Mr. McCrary is entitled to qualified immunity from money damages.

Ms. Comstock went to great lengths in front of the District Court to point out things that Mr. McCrary could have done differently. That, however, is not the question. As this Court held:

> [T]he question whether an x-ray, or additional diagnostic techniques or forms of treatment are indicated is a classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measures, does not represent cruel and unusual punishment. At most, it is medical malpractice, and as such the

> proper forum is the state court. [*Estelle, supra*, at 107.]

Simply suggesting alternate methods of treatment does not set forth an Eighth Amendment violation.

In *Saucier, supra*, this Court held that any analysis of qualified immunity had to begin with whether a constitutional violation had even occurred. Under *Farmer* and *Estelle*, Ms. Comstock cannot establish that a constitutional violation even occurred. The Court of Appeals should not have ever proceeded to determine whether Mr. McCrary violated a clearly established right. Once Mr. Montgomery received care, Mr. McCrary could not have acted with deliberate indifference. Simply because Dr. Sheiner had a different opinion does not mean that Mr. McCrary failed to take reasonable steps to treat Mr. Montgomery.

Because the Court of Appeals opinion is in direct conflict with Supreme Court precedent, this Court should grant the Petition for Certiorari and reverse the Court of Appeals.

CONCLUSION

For all of these reasons, Mr. McCrary respectfully requests this Court to grant Certiorari and reverse the Court of Appeals.

Respectfully submitted,

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Dated: May, 2002

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Carolyn Comstock, *Plaintiff-Appellee,* *v.* Norris McCrary; V. S. Thyagarajan; and David Howell, *Defendants-Appellants.*	No. 99-2448

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 97-74806--Anna Diggs Taylor, District Judge.
Argued: April 25, 2001

Decided and Filed: December 12, 2001

Before: MARTIN, Chief Judge; MOORE, Circuit Judge;
O'MALLEY, District Judge.*

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* The Honorable Kathleen McDonald O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Michael C. McDaniel, OFFICE OF THE ATTORNEY GENERAL, TORT DEFENSE DIVISION, Lansing, Michigan, for Appellants. Todd J. Stearn, BRIAN DAILEY LAW FIRM, Farmington Hills, Michigan, for Appellee. **ON BRIEF:** John L. Thurber, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Brian T. Dailey, BRIAN DAILEY LAW FIRM, Farmington Hills, Michigan, for Appellee.

MOORE, J., delivered the opinion of the court, in which MARTIN, C. J., joined. O'MALLEY, D. J. (pp. 29-30), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Billy Wade Montgomery committed suicide on March 3, 1995 at the Reception and Guidance Center ("RGC") of the State Prison of Southern Michigan. Plaintiff-appellee Carolyn Comstock, the personal representative of Montgomery's estate, brought suit under 42 U.S.C. § 1983 against defendants-appellants Norris McCrary, a psychologist, V.S. Thyagarajan, a medical doctor, and David Howell, a physician's assistant, all of whom were employed by the Michigan Department of Corrections, alleging, *inter alia*, that defendants displayed deliberate indifference to Montgomery's serious medical needs, thereby denying him his rights under the Eighth Amendment to the Constitution. The plaintiff and the defendants cross-moved for summary judgment. The district court denied both parties' motions for summary judgment, concluding that the defendants were not protected from suit by qualified immunity. The defendants appeal the district court's denial of their motions for

summary judgment. For the following reasons, we **AFFIRM** the district court's judgment as to defendant McCrary, but **REVERSE** as to defendants Howell and Thyagarajan.

BACKGROUND

On February 22, 1995, Montgomery was transferred from the St. Joseph County Jail in Centerville, Michigan, where he had been housed since June 28, 1994, to the RGC at the State Prison of Southern Michigan.[1] Montgomery was completing a sentence for his third Operating Under the Influence of Liquor conviction. His earliest release date from prison was April 11, 1995. Upon his arrival at the RGC, Montgomery was placed in administrative segregation on the floor of a cell block known as "Top 6."

On March 2, 1995, Montgomery was referred for psychological evaluation by a resident officer who observed him acting despondently in his cell, and had heard that the previous shift's guard had removed sharp objects from Montgomery out of concern for his safety. Norris McCrary, a prison psychologist, was assigned to evaluate Montgomery. McCrary met with Montgomery in his cell at 10:55 a.m. that morning. McCrary's notes indicate that, in the course of their meeting, Montgomery reported feeling depressed and stated that "his nerves are shot and that he 'feels like he's going to die.'" Joint Appendix ("J.A.") at 61. McCrary then noted, "Inmate reports feeling suicidal but with no specific plan. Lethality however appears to be moderate." *Id.* McCrary's notes also reveal that Montgomery "[s]tated that he wasn't being pressed or threatened by anyone." *Id.* At 11:30 a.m., McCrary placed Montgomery on close observational status, or "suicide watch." While on suicide watch, Montgomery was

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[1] All male felons over the age of 21 pass through the RGC for medical and security clearance prior to being sent to the appropriate correctional facility.

dressed in a suicide or "bam-bam" suit, restricted to finger foods, prohibited from having sharp objects, and checked on every ten minutes. McCrary also scheduled Montgomery to meet with the Outpatient Mental Health Team. J.A. at 24, 61, 107.

The next day, March 3, 1995, at 9:45 a.m., Howell conducted a previously scheduled physical examination of Montgomery. McCrary's notes from his interview with Montgomery the day before were not in the file. J.A. at 179 (Howell Dep.). Howell made a contemporaneous "progress report," which noted the following:

> Patient seen in "BAM-BAM" suicide prevention garment . . . states that he is not depressed and has no thoughts of self-harm. States that his main problem is that other inmates have threatened to kill him because they believe he is a "snitch" -- stated he had thoughts of dying in order to get locked down in safe area. No psychotic signs/symptoms noted.

J.A. at 62. Howell's progress note was placed in Montgomery's medical file. Howell did not report to anyone that Montgomery had been labeled a snitch.[2]

Thyagarajan, who was Howell's supervisor, reviewed Howell's progress note as required by prison procedure, and signed off on the note sometime on March 3, 1995. J.A. at 62,

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[2] Being labeled a "snitch" was dreaded, because it could make the inmate a target for other prisoners' attacks. J.A. at 115 (Smith Dep.). McCrary testified in his deposition that he knew that "a prisoner in prison definitely doesn't want to be labeled a snitch, that's probably the worst label that you can -- could have put on you if you were in prison." J.A. at 97 (McCrary Dep.); *see also* J.A. at 67 (Howell Dep.) (stating that "to be called a snitch can place you at peril").

203. He never met with Montgomery or looked at his medical records.

At 10:13 a.m. that same morning, following Howell's visit, McCrary met with Montgomery for slightly less than a half hour, during which time he reevaluated Montgomery's mental state. McCrary performed his evaluation by speaking with Montgomery. He stated that while the conversation did not last a long time, it "was enough time for me to ascertain from him, you know, was he feeling suicidal." J.A. at 84 (McCrary Dep.). McCrary then stated that he "suspected that something was going on between Mr. Montgomery and the other prisoners. But Mr. Montgomery did not inform me of what that was. I asked him that question again when I saw him on the 3rd, and he still didn't say anything to me about that." *Id.* Based on their conversation, McCrary concluded that,

> [H]e wasn't suicidal. That's what he told me. He said he wasn't feeling suicidal. He had no thoughts of going to hurt himself. I did ask him some questions, mental status. And he said something that he knew he was going to go back up to Top Six.
>
> And when he told me that he wasn't feeling suicidal, and based just on his affect and how he came across to me, *I took him at his word that he wasn't feeling suicidal.* So I took him off of close observational status.

Id. (emphasis added). According to McCrary, there was a change from Montgomery's demeanor the day before: Montgomery was "less anxious," and "he didn't seem to be as worried and uptight as" he had been. *Id.* Indeed, he was like "a lot of prisoners who've been in the same situation." *Id.* Therefore, he recommended that Montgomery be sent back to his cell in administrative segregation.

At approximately 4:29 p.m. that afternoon, Montgomery committed suicide in his cell on Top 6 by hanging himself with a sheet fashioned into a rope. He left a suicide note for his girlfriend which read: "I love you Cindy, and I always will. I am sorry, but I couldn't let them do it to me. Please forgive me. I will always be with you. Love, always and forever." J.A. at 70 (Suicide Note).

Subsequent to her appointment as the representative of Montgomery's estate, Comstock commenced this litigation by bringing suit under 42 U.S.C. § 1983 against McCrary, Howell, and Thyagarjan, in their individual capacities. The complaint alleged that defendants violated Montgomery's Eighth Amendment right to be free from cruel and unusual punishment by displaying deliberate indifference to his medical needs, and that, under state law, they were grossly negligent in his care. In an amended complaint, Comstock added an Eighth Amendment failure-to-protect-from-harm claim against McCrary and Howell.

Comstock then moved for summary judgment with respect to defendant McCrary, alleging that there was no genuine issue of material fact that McCrary recklessly removed Montgomery from suicide watch "without conducting any investigation into the reasons and causes underlying Mr. Montgomery's suicidal ideation" and that this conduct proximately caused Montgomery's death. J.A. at 36. According to Comstock, McCrary's failure to perform a thorough psychological examination, which would have revealed that Montgomery had been labeled a "snitch" and that his suicidal urge was motivated by his fear of the other inmates, amounted to deliberate indifference to Montgomery's serious medical needs. As evidence of this deliberate indifference, McCrary simply took Montgomery at his word that he was feeling better and released him from suicide watch, instead of taking steps to confirm Montgomery's changed mental status, identify the source of Montgomery's fears, and take further action to protect Montgomery from himself.

In response, McCrary filed a motion for summary judgment, asserting that he did not perceive that there was a substantial risk of harm to Montgomery on March 3, 1995 when he made the decision to release Montgomery from close observation. J.A. at 160. Moreover, McCrary argues, whether he could have performed a more in-depth evaluation of Montgomery is irrelevant because a dispute over a doctor's medical judgment does not amount to a violation of a patient's constitutional rights. He then asserted that, "[a]t the very least," he was entitled to qualified immunity. J.A. at 162. McCrary also sought summary judgment on the claims for failure to protect under the Eighth Amendment and gross negligence under state law.

Defendants Howell and Thyagarajan then moved for summary judgment, respectively, asserting that they failed to perceive that Montgomery posed a risk of harm to himself and that their lack of knowledge was not disputed. Each also invoked the shield of qualified immunity.

The district court denied plaintiff's motion for summary judgment on her claims of deliberate indifference and gross negligence, as well as McCrary's cross-motion on those counts, finding that summary judgment was inappropriate because there were genuine issues of material fact in dispute. The district court also denied McCrary's motion for summary judgment based on qualified immunity, although it granted McCrary's motion for summary judgment on the failure to protect claim. J.A. at 251.

All three defendants then filed a renewed motion for summary judgment arguing for qualified immunity in light of this court's decision in *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999) (en banc), handed down after the district court's first order. Thereafter, the district court held a hearing on the applicability of *Williams* to the case before it, and again denied the defendants' motion for summary judgment. J.A. at 303. Defendants' timely interlocutory appeal followed. J.A. at 288.

ANALYSIS

I. Jurisdiction

Before proceeding to the merits of this case, we must consider our jurisdiction to hear this appeal. A district court's denial of a motion for summary judgment is generally not appealable because the applicable statute, 28 U.S.C. § 1291, only vests appellate courts with jurisdiction over a district court's "final decision." "Given this statute, interlocutory appeals -- appeals before the end of district court proceedings -- are the exception, not the rule." *Johnson v. Jones*, 515 U.S. 304, 309 (1995). The Supreme Court has held, however, that under the collateral order doctrine, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Subsequently, in *Johnson v. Jones*, 515 U.S. at 313, the Supreme Court clarified that the *Mitchell* decision was "explicitly limited . . . to appeals challenging, not a district court's determination about what factual issues are 'genuine,' . . . but the purely legal issue what law was 'clearly established'." Consistent with *Johnson*, we have stated that "in order for an interlocutory appeal to be appropriate, a defendant seeking qualified immunity must be willing to concede to the facts as alleged by the plaintiff and discuss only the legal issues raised by the case." *Shehee v. Luttrell*, 199 F.3d 295, 299 (6th Cir. 1999) (citing *Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998)).

Although factual issues were contested before the district court, for the purposes of this appeal, both parties have explicitly stipulated to plaintiff's version of the facts.)[3] *Cf. Booher v. N. Kentucky Univ. Bd. of Regents*, 163 F.3d 395, 396 (6th Cir. 1999) (determining that appellate court lacked jurisdiction over defendants' appeal from district court's decision denying them qualified immunity because, while defendants claimed in their brief that they had conceded facts on appeal, defendants actually disputed "several of the factual determinations underlying the district court's denial of qualified immunity"). Therefore, just as we held in *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999) (en banc), another prisoner-suicide case in which the defendants-officials invoked qualified immunity, because this case turns on whether the facts, admitted by the defendants for purposes of this appeal, "'show[] a violation of clearly established law,' not on 'which facts the parties may be able to prove,' the district court's denial of qualified immunity is a 'final order' under 28 U.S.C. § 1291, and we have jurisdiction to decide the case on the merits." *Id.* (quoting *Johnson*, 515 U.S. at 311).

II. Standard of Review

We review a district court's denial of qualified immunity de novo. *Shehee*, 199 F.3d at 299; *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996).

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[3] Our review is made difficult by the district court's failure to make findings of fact for this court to assume as true. *Cf. Johnson*, 515 U.S. at 319 (noting that when "[d]istrict judges . . . deny summary judgment motions without indicating their reasons for doing so[,]" appellate courts "may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed"). In order to conduct our review, we have, therefore, read the record in the light most favorable to the plaintiff.

III. Qualified Immunity

In civil suits for money damages, government officials acting in their official capacity are entitled to qualified immunity for discretionary acts which do not violate clearly established law of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is not a defense to liability; where it is applicable, its purpose is to shield the officer from suit altogether, saving him from the burdens of discovery and costs of trial. *Mitchell*, 472 U.S. at 526. The Supreme Court has recently clarified that, in order to assess whether the defendants-officials in this case should be cloaked with immunity from suit, we must engage in a two-part, sequential analysis: first, we must determine whether the plaintiff has alleged facts which, when taken in the light most favorable to her, show that the defendant-official's conduct violated a constitutionally protected right; if we answer the first question in the affirmative, we must then determine whether that right was clearly established such that a reasonable official, at the time the act was committed, would have understood that his behavior violated that right. *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001).

It is crucial, the Supreme Court has noted, that the second inquiry "be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* Thus, "[t]he relevant, dispositive inquiry . . . is whether would it be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." In other words, as the Court stated in *Anderson*, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. We need not, of course, find a case in which "the very action in question has previously been held unlawful," but, "in the light of pre-existing law[,] the unlawfulness must be apparent." *Id.* In evaluating the contours of the right, "we look first to decisions of the Supreme Court, then to decisions of this Court and other

courts within our circuit, and finally to decisions of other circuits." *Dickerson*, 101 F.3d at 1158 (internal quotation omitted).

Addressing the first inquiry of the qualified immunity analysis, whether plaintiff has alleged facts which, when assumed to be true, show that the defendants' conduct violated a constitutional right, the Supreme Court has held that, under the Eighth Amendment's proscription on cruel and unusual punishment, prisoners have a constitutional right to medical care. *Estelle v. Gamb.* 429 U.S. 97, 103 (1976). The Court explained that a prisoner's Eighth Amendment right is violated when prison doctors or officials are deliberately indifferent to the prisoner's serious medical needs. *Id.* at 104. While the right to medical care for serious medical needs does not encompass the right "to be screened correctly for suicidal tendencies," we have long held that prison officials who have been alerted to a prisoner's serious medical needs are under an obligation to offer medical care to such a prisoner. *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990), (noting that "[i]f a prisoner asks for and needs medical care, it must be supplied"); *see also Yellow Horse v. Pennington Cty.*, 225 F.3d 923, 927 (8th Cir. 2000) (holding that prisoner "had a clearly established constitutional right to be protected from the known risks of suicide and to have his serious medical needs attended to"); *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1989) (noting that prison inmate has Eighth Amendment right be free from deliberate indifference to serious psychiatric needs).

An Eighth Amendment claim has two components, one objective and one subjective. To satisfy the objective component, the plaintiff must allege that the medical need at issue is "sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To satisfy the subjective component, the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk. *Farmer*, 511

U.S. at 837. Emphasizing the subjective nature of this inquiry, the Supreme Court has noted that "an official's failure to alleviate a significant risk that *he should have perceived but did not*, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838 (emphasis added).

The requirement that the official have subjectively perceived a risk of harm and then disregarded it is meant to prevent the constitutionalization of medical malpractice claims; thus, a plaintiff alleging deliberate indifference must show more than negligence or the misdiagnosis of an ailment. *See Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *Farmer*, 511 U.S. at 835 (noting that deliberate indifference "describes a state of mind more blameworthy than negligence"). When a prison doctor provides treatment, albeit carelessly or inefficaciously, to a prisoner, he has not displayed a deliberate indifference to the prisoner's needs, but merely a degree of incompetence which does not rise to the level of a constitutional violation. On the other hand, a plaintiff need not show that the official acted "for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835; *see also Horn*, 22 F.3d at 660 ("Officials may be shown to be deliberately indifferent to such serious needs without evidence of conscious intent to inflict pain."). Instead, "deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Farmer*, 511 U.S. at 836.

Although the plaintiff bears the onerous burden of proving the official's subjective knowledge, this element is subject to proof by "the usual ways." *Farmer*, 511 U.S. at 842. Thus, the Supreme Court noted that it was permissible for reviewing courts to infer from circumstantial evidence that a prison official had the requisite knowledge. *Id.* at 842. Moreover, the Court warned, a prison offical may "not escape liability if the evidence showed that he merely refused to verify underlying

facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Id.* at 843 n.8.

With these principles in mind, we turn to the merits of plaintiff's case.

A. Defendant-Appellant McCrary

(1)Objective component of Eighth Amendment claim

As noted above, to satisfy the objective component of an Eighth Amendment claim, the plaintiff must allege that the medical need at issue is "sufficiently serious." *Farmer*, 511 U.S. at 834. We have held that a prisoner's "psychological needs may constitute serious medical needs, especially when they result in suicidal tendencies." *Horn v. Madison Cty. Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994). Because plaintiff alleges that defendants were indifferent to Montgomery's psychological needs, namely his suicidal tendency, she easily satisfies the objective component of her constitutional claim.

(2)McCrary's subjective knowledge that Montgomery posed serious risk of harm to himself

To satisfy the first part of the subjective component of her Eighth Amendment claim, plaintiff alleges that McCrary had subjective knowledge of Montgomery's risk of suicide on March 3, 1995 because he had placed him on close observational status the day before. McCrary counters that because Montgomery lied to him about his mental state on March 3, 1995, he did not subjectively perceive that Montgomery was suicidal when he released him from suicide watch. Because he lacked the requisite subjective perception of Montgomery's suicidal state, McCrary argues that he cannot be found deliberately indifferent to Montgomery's medical needs.

While defendants try to frame our analysis as whether McCrary perceived that Montgomery was suicidal *when he made the decision to release Montgomery from close observation*, we believe that the proper analysis requires us to

ask whether McCrary perceived that Montgomery was suicidal *when he commenced his evaluation of Montgomery on the morning of March 3, 1995*. We believe that we must focus on this anterior question because it was McCrary's cursory evaluation of Montgomery prior to his recommendation that Montgomery be released which, according to plaintiff, constituted the deliberate indifference to Montgomery's serious medical needs.

When viewed from the proper perspective, we believe that the plaintiff has alleged sufficient facts from which a trier of fact could conclude that McCrary subjectively perceived that Montgomery was suicidal when he went to evaluate Montgomery on the morning of March 3, 1995. We know that McCrary had found Montgomery suicidal on March 2, 1995 because he took notes remarking on Montgomery's suicidal state and placed Montgomery on close observational status. J.A. at 61 (McCrary progress note). In the absence of any intervening events, we must conclude that, when McCrary went to interview Montgomery on the morning of March 3, 1995, he still believed him to be at risk of serious self-inflicted harm. *Cf. Ellis v. Washington Cty. & Johnson City, Tenn.*, 198 F.3d 225, 227 (6th Cir. 1999) (rejecting plaintiff's claim that jailors were deliberately indifferent to prisoner because prisoner gave no indication of his suicidal state from the time he arrived at jail to moment he committed suicide that would have put a reasonable jailor on notice of prisoner's suicidal intent); *Horn*, 22 F.3d at 660 (same).

Moreover, plaintiff has put forward evidence tending to show that McCrary was aware that Montgomery was having problems with other inmates, which was at least one source of Montgomery's suicidal urge. Although in his deposition McCrary stressed that Montgomery did not explicitly tell him, either on March 2 or March 3, 1995, that he had been labeled a "snitch" and that the other prisoners were threatening him, McCrary's deposition testimony reveals that he had knowledge that Montgomery was not on good terms with the other members of his cell block.

Q:When you evaluated Mr. Montgomery on March 2nd and March 3rd of '95, did, in your opinion, did you feel like he felt in any physical jeopardy or peril from other inmates?

A:That was something that was on my mind that I asked Mr. Montgomery several times, both on the second and the third, but -- *I had a suspicion that something was going on, but Mr. Montgomery would not tell me directly that something was going on between him and the other prisoners.*

Q:Why were you suspicious that something was going on?

A:The first time I had contact with him, on the 2nd, when I went up to top six to see him, *the other inmates were making a lot of noise and racket, which seemed to me sort of out of place.* I mean, it was more than just general chitchatter. When I first had contact with Mr. Montgomery I was interviewing him through his cell door, and I couldn't hear exactly what the other inmates were saying, but they just seemed to be making a lot of agitation, a lot of noises and whatnot. And I just -- and in terms of me talking with him, I asked him directly, I said, Are you being pressed by the other inmates? I asked him that question directly, and he -- only thing he said to me -- now, these are his words -- he said, *There's some shit going on up here.* That's all he said with regard to that, he didn't say anything else. And then I went on ahead to assess his mental status.

***

> Q:At that time what did you think, in your opinion, based on your experiences in the prison, and, again, with inmates, was the reason for the commotion; what do you think they were agitated about?
>
> A:Well, I did ask Mr. Montgomery was he being pressed and meant, you know, was he having problems with the other inmates, have the other inmates threatened him, and, of course, the other inmates could threaten another inmate for a variety of reasons. I didn't know what particularly was going on, but I just had -- *and I felt that it was something going on between him and the other men on the block.*
>
> Q:They didn't like him?
>
> A:*They didn't like him for some reason, yes.*

J.A. at 93, 96 (emphases added). When asked to describe the commotion on the floor when he went to visit Montgomery, McCrary stated that "it seemed like the whole block was just sort of in an uproar. It seemed like noise was not just coming from one or two men in a couple adjacent cells, it just seemed like a whole block that the inmates were just being verbally agitated and were making a lot of noise. And as I was talking to Mr. Montgomery, *so I just thought maybe there's something else going on up here* . . . ." J.A. at 94-95 (emphasis added). Indeed, McCrary reported that the inmates "were yelling" and that he "had to kind of get closer to the door to hear what Mr. Montgomery was saying, that's how loud the noise was." *Id.*

McCrary's testimony reveals that, because of the "uproar," the unusual amount of "noise and racket," and the "yelling" coming from the cellblock when he went to visit Montgomery,

he "had a suspicion" that "something was going on between him and the other men on the block," and that he perceived that the other inmates "didn't like" Montgomery for some reason. Although it is true that Montgomery did not directly inform McCrary that he had been labeled a "snitch" and felt threatened, neither did he deny it. Instead, he informed McCrary that, "*[t]here's some shit going on up here*," indicating that he was, in fact, experiencing some difficulty with the other prisoners, although he apparently declined to elaborate further on the nature of the difficulty.[4]

In light of McCrary's admitted suspicion on March 2, 1995 that "something was going on between [Montgomery] and the other men on the block" and his conclusion that Montgomery was suicidal enough to be placed under close observation, we must conclude that McCrary subjectively perceived the risk of serious harm to Montgomery on March 3, 1995, including the fact that Montgomery's mental state was affected by the other inmates' dislike for him. McCrary cannot escape a finding of his subjective knowledge of risk just because he "declined to confirm inferences of risk," namely that Montgomery felt threatened by other prisoners, "that he strongly suspected to exist." *Farmer*, 511 U.S. at 843 n.8.

(3)Evidence demonstrating that McCrary disregarded the risk of serious harm

Even though, on the facts alleged, McCrary perceived a substantial risk of serious harm to Montgomery on the morning of March 3, 1995, McCrary may still prevail if he "responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844. In other words, if McCrary

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[4] McCrary recognized that Montgomery may have been reluctant to explain to him the situation with the other inmates on March 2, 1995, because the inmates in adjacent cells could overhear their conversation. J.A. at 97 (McCrary Dep.).

was not "failing to treat" Montgomery, or "doing less than [his] training indicated was necessary," *Williams*, 186 F.3d at 692, when he reevaluated Montgomery on March 3, 1995, then he cannot be said to have consciously disregarded the risk of serious harm.

Comstock asserts, and McCrary admitted in his deposition testimony, that, when making the decision to send Montgomery back to his cell, McCrary did not (1) review the battery of psychological tests administered to Montgomery on February 27, 1995, J.A. at 81; (2) review Montgomery's medical records or institutional file, and therefore did not read Howell's progress note indicating that Montgomery had been labeled a snitch, J.A. at 85; (3) speak to the resident officer who had referred Montgomery for a psychological consultation, J.A. at 86; (4) speak with the prison guards who daily observed Montgomery, J.A. at 87; (5) check the log book entries kept by the RGC control center or Top 6 where Montgomery was housed, J.A. at 92, which noted that Montgomery told a prison guard that "they are going to kill him," J.A. at 105, and that he did not want yard time and did not want to shower, J.A. at 106; or (6) speak with other two psychologists who had met with Montgomery previously, J.A. at 90. Plaintiff also claims that McCrary did not ensure that the Outpatient Mental Health Team conducted an evaluation of Montgomery, as McCrary had ordered only the day before.

Comstock further alleges that McCrary's conduct violated the Department of Corrections policy directive regarding suicide prevention in several ways: (1) he failed to review the custody staff referral form CHX-212 or, alternatively, speak with the custody officers who referred Montgomery for evaluation; (2) he failed to follow form CHJ-180, an evaluation of suicide risk prisoners, and to review Montgomery's institutional file and health record; and (3) he failed to complete a written health record when removing Montgomery from close observation. J.A. at 40 n.3, 153 (Suicide Prevention Policy Directive).

Notwithstanding the facial inadequacy of McCrary's March 3, 1995 evaluation, McCrary's own deposition testimony reveals that he did not respond reasonably to, and therefore disregarded, the risk that Montgomery might inflict harm upon himself when he interviewed Montgomery on the morning of March 3, 1995. His testimony is particularly striking in light of the fact that McCrary testified that he knew that a prisoner might lie about how he was feeling in order to be taken off close observation and to thereby gain an opportunity to commit suicide. J.A. at 81 (McCrary Dep.); *see also* J.A. at 99 (McCrary Dep.) ("Well, a lot of times inmates are not truthful about things that are going on with them, so it doesn't surprise me that, in this instance, that maybe that same kind of thing was happening.").

McCrary testified at length about the ways in which his evaluation of Montgomery's mental status would have been improved by consultation with other sources in order to corroborate Montgomery's assertion that he was feeling fine and that he was not being threatened by other inmates. In his deposition, McCrary acknowledged (1) that reviewing the results of the battery of psychological tests administered to Montgomery on February 27, 1995 in conjunction with his progress note of March 2, 1995 would have heightened his awareness that Montgomery was at risk of committing suicide, J.A. at 83; (2) that, had he reviewed Montgomery's medical file prior to releasing him from close observation, he would have known that Montgomery had confided in Howell about being labeled a "snitch" and that Montgomery was, therefore, lying to him about his fear of the other inmates; (3) *with this information, he would have recommended that Montgomery be taken off of close observational status and placed in protective custody, as opposed to being sent back to his cell in administrative segregation*, J.A. at 85; (4) there was no reason why he did not look at the medical file before meeting with Montgomery, and that he easily could have looked at the file but chose not to, J.A. at 85; (5) information gleaned from conversations with custody officers who observed

Montgomery would have been useful in evaluating Montgomery's mental state, J.A. at 87; and (6) entries in the log book from February 28, 1995, just two days before he evaluated Montgomery, which indicated that Montgomery stated "they are going to kill him," J.A. at 105, that he did not want yard time, that he would not open his door during yard time, and that he refused a shower, J.A. at 106, would have alerted him to the fact that Montgomery was lying to him about feeling threatened by other inmates, J.A. at 98. Finally, McCrary stated that, if he had known all of the information that was available to him, he would not have removed Montgomery from close observational status, J.A. at 102, and that he would have determined that Montgomery was a suicide threat, J.A. at 104.

McCrary's defense hinges on whether his decision to evaluate Montgomery by merely asking him questions, as opposed to performing any additional corroborative investigation, constituted "an inadvertent failure to provide adequate medical care," *Estelle*, 429 U.S. at 105, or a reasonable response to a known risk to the inmate's health or safety, *Farmer*, 511 U.S. at 844, both of which would entitle him to qualified immunity.[5] Supporting plaintiff's contentions that McCrary was deliberately indifferent to Montgomery's

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[5] Although defendants strenuously argue that "if medical treatment is given it is not a courts [sic] job to second guess the treatment given," Appellant's Reply Br. at 1, the issue is not whether McCrary provided *some* medical attention to Montgomery, but rather whether McCrary's conduct evinced deliberate indifference to Montgomery's serious medical needs. Defendants' position is, apparently, that if a prison doctor offers some treatment, no matter how insignificant, he cannot be found deliberately indifferent. This is not the law: as the Supreme Court noted in *Estelle*, 429 U.S. at 104-05 & n.10, a prison doctor's medical response to an inmate's serious need may constitute deliberate indifference just as readily as the intentional denial or delay of treatment.

serious medical needs are depositions from three experts, one by Dr. Robert Walsh, who was the Administrator of Psychological Services for the Jackson Clinical Complex, one by Brian Smith, a Department of Corrections psychologist in 1995, and one by Dr. Gerald Shiener, the plaintiff's expert psychiatrist, describing the appropriate standard of care.

Dr. Walsh testified in a deposition that, had he committed a prisoner to close observational status on day one, he would perform the following evaluation on day two:

> I would review whatever file material I had on him. I would probably talk with the officers that are up there in terms of any observations they might have on him. And then I would sit down and have an interview with him.
>
> I would evaluate what he was telling me and compare it with what was going on the day before. I would evaluate his affect or his emotion, how coherent and how clear his thinking and thoughts seem to be and I would try to compare the difference between the two to look for any change in terms of the factors that were present the day before and how they compare with the way he is interacting on this new day.

J.A. at 133 (Walsh Dep.). Dr. Walsh then stated that he would not take anyone off suicide watch without reviewing his medical file, J.A. at 134; that it was "routine[]" to talk to the custody officers who referred the inmate to psychological services, because they would tell him anything "that the prisoner isn't telling" him, J.A. at 134; that he would "definitely" look at the control center log book for "[a]nything unusual" that would be noted there, J.A. at 138, and that he would "definitely" look at any psychological testing that had been done, J.A. at 140. Finally, he noted that it would be

"inconceivable" that he would fail to consult the above sources of information if they were available to him. J.A. at 149.

Brian Smith, the Department of Corrections psychologist, testified that it would be "helpful" to review the results of any psychological testing when evaluating an inmate's mental health; it would be "helpful" to review the medical file, and that he could not recall an incident in which he had released an inmate from suicide watch without reviewing the medical file; that it would be "routine" to talk to the custody officers on the inmate's cell block when evaluating the inmate; and that, prior to placing an inmate on close observational status, he would have checked the log books for observations made by custody officers for "collaborative information." J.A. at 112-13.

Finally, Dr. Shiener, a psychiatrist and an expert for the plaintiff, testified that McCrary's March 3, 1995 interview with Montgomery was "grossly inadequate," and that McCrary "used none of his professional skills" in making the assessment that Montgomery was no longer suicidal. J.A. at 124 (Shiener Dep.). Dr. Shiener noted that "certain obvious and glowing factors were ignored in a very cavalier manner," J.A. at 123 (Shiener Dep.), including the fact that only the day before, McCrary had "judged [Montgomery] to be at such great risk that he should be relieved of his clothes; not given utensils but only finger foods; be placed in a situation of close observation and . . . that nothing had really changed [from the day before]." J.A. at 125-26 (Shiener Dep.). Dr. Shiener then elaborated:

> There's no documentation that he [McCrary] talked to him [Montgomery] in any depth or at any length. There's no documentation that he described or appreciated what had changed, other than the fact that, "Oh, he was saying he was going to kill himself yesterday. He's saying he's not going to do it today." *And there was no detailed description of his emotional state, his state of agitation, his state of desperation, what his resolution was about some of the problems*

> *he was facing in the population. There was none of that."*

J.A. at 127 (Shiener Dep.) (emphasis added).

McCrary offers nothing to refute the evidence that his level of care was grossly substandard other than to say that he exercised his medical judgment when he removed Montgomery from suicide watch. Neither does he dispute plaintiff's assertion that when he discharged Montgomery, he failed to follow the prison's policies with regard to suicide prevention. Indeed, the Michigan Department of Corrections Police Directive on Suicide Prevention, included in the record, J.A. at 150, indicates that a psychologist's evaluation of an inmate who has been placed in close observation must "*include review of the prisoner's institutional file and health record* as well as an interview with the prisoner." J.A. at 153 (emphasis added). There is nothing in the record to indicate that McCrary followed these procedures. *Cf. Yellow Horse*, 225 F.3d at 927-28 (affirming summary judgment for prison guard because plaintiff could point to no evidence showing that guard failed to follow prison policies when releasing inmate from suicide watch).

After reviewing this record in the light most favorable to the party alleging a constitutional injury, we are left with the impression that McCrary did not act with actual malice or an intent to harm Montgomery. On the other hand, McCrary's failure to conduct *any* investigation into whether Montgomery was lying to him about his state of mind must, when compared to the standard of care described by Dr. Walsh and Smith for evaluating a suicidal inmate's mental state, as well as the prison's internal policies for suicide prevention, be considered more than negligent. *Cf. Sanderfer v. Nichols*, 62 F.3d 151, 155 (6th Cir. 1995) (holding that where nurse treated inmate for asthma and inmate subsequently died of heart failure, nurse was, at most, negligent in her care, despite fact that she failed to learn from inmate's medical records that he had high blood pressure and to treat him accordingly, because she was not

aware that inmate was at substantial risk of heart failure). Simple negligence would have been the failure to perform one, or even some, of the tasks that the other psychologists testified would be "routinely" conducted by them in evaluating a known suicide risk. In this case, however, McCrary admittedly performed *none* of these tasks, other than to ask Montgomery how he was feeling, and then to take him at his word that he was better. Our conclusion that McCrary's conduct was more than negligent is bolstered by the fact that he had found Montgomery sufficiently at risk to put him on suicide watch only the day before; that he *knew* that something was going on between Montgomery and the other inmates, and that the other inmates did not like Montgomery; and that he *knew* that suicidal inmates on close observational status may lie about their state of mind to facilitate their transfer to a place where they have an opportunity to commit suicide, but he took no precaution to account for that possibility.

Having concluded that McCrary's conduct was clearly more than negligent, we are left with the question whether it was recklessly indifferent. Defendants strenuously argue that the answer is provided by *Williams v. Mehra*, another prisoner-suicide case, in which we held that the defendants-psychiatrists who administered care to the prisoner should be granted qualified immunity. We believe *Williams* is completely distinguishable from the instant case. The *Williams* decision was based upon the en banc court's conclusion that while the defendants-psychiatrists there perceived that the patient-inmate was suicidal, they did not, through their method of treatment, clearly disregard the risk that he would inflict self-harm. In that case, the defendants-psychiatrists knew that the inmate had previously attempted to kill himself by overdosing on pills, so they administered his medication to him in a pill line to prevent the possibility of hoarding. Despite the precaution of the pill line, the inmate managed to stockpile pills and ultimately killed himself by overdosing. *See Williams*, 186 F.3d at 688-89. We rejected the plaintiff's § 1983 claim alleging that the defendants-psychiatrists who had cared for the inmate were

deliberately indifferent to his medical needs because they failed to give him his medication in liquid, as opposed to pill, form. In concluding that defendants-psychiatrists did not disregard the risk of harm to the inmate, we noted that "the doctors recognized the possibility of suicide and prescribed [the inmate's] medication knowing that it would be dispensed, one dose at a time, under the supervision of a nurse who would watch while he took it to prevent hoarding." *Id.* at 692. In light of this method of treatment, we noted that "[t]here is nothing to suggest that the doctors were failing to treat [the inmate] or doing less than their training indicated was necessary." *Id.*

In this case, in contrast, there is an abundance of evidence that McCrary did not respond reasonably to the substantial risk of harm, of which he was subjectively aware, to Montgomery's health and safety. *See Farmer*, 511 U.S. at 844. Contrary to McCrary's assertions, we do not quarrel over whether "an additional diagnostic technique[] or form[] of treatment," *Estelle*, 429 U.S. at 107, would have been helpful in preventing Montgomery's suicide. On the record before us, it does not appear that McCrary chose one medically reasonable form of treatment over another, as did the doctor in *Estelle*, who treated an inmate suffering from chronic back pain with bed rest, muscle relaxants, and pain relievers, instead of ordering an X-ray which might have better diagnosed the inmate's problem, or the psychiatrists in *Williams*, who took the precaution of administering the inmate's medication to him in a pill line, although not in liquid form, to prevent the possibility of hoarding and overdosing. In this case, the plaintiff has alleged facts which show that McCrary released Montgomery from suicide watch without making any "reasoned assessment or evaluation of the patient's suicide risk," J.A. at 126 (Shiener Dep.).

Because we must adopt as true, for purposes of our review, Dr. Shiener's conclusion that McCrary's evaluation was "grossly inadequate" and was conducted with "none of [McCrary's] professional skills," J.A. at 124, as well as the fact that McCrary's follow-up "evaluation" left him with no way to

corroborate Montgomery's self-serving statement that he was feeling better, despite the fact that McCrary knew that a suicidal prisoner on close observation may lie in order to gain the opportunity to commit suicide, we conclude that plaintiff has presented sufficient evidence that, if true, would show that McCrary's evaluation was unreasonable and constituted deliberate indifference to the risk that Montgomery would harm himself when presented with the opportunity. *Cf. Jacobs v. West Feliciana Sheriff's Dep't*, 228 F.3d 388, 395-96 (5th Cir. 2000) (finding that plaintiff had presented sufficient evidence for jury to conclude that sheriff who knew that inmate was suicidal was deliberately indifferent to inmate, even though he "did not completely ignore [inmate's] suicidal condition," because he put inmate in cell with "tie-off points" and a blind spot).

(4)Clearly Established Law

Once we have concluded that plaintiff has alleged facts which, if true, would show the violation of a constitutional right, we must assess whether that right was clearly established in March 1995 such that a reasonable official would have understood that his conduct violated the right. *See Saucier*, 121 S. Ct. at 2159; *Danese*, 875 F.2d at 1242 (noting that relevant question "is whether any official could have, in light of the preexisting law, reasonably believed that his action was lawful"). As the Supreme Court has instructed, we need not find a case in which "the very action in question has previously been held unlawful," but, "in the light of pre-existing law[,] the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

The right at issue in this case is not, as defendants argue, the right to be diagnosed accurately for one's propensity to commit suicide; Montgomery had already been correctly identified as suicidal by McCrary and the prison staff. As we have discussed above, the right that plaintiff claims on Montgomery's behalf is the more basic right to continuing medical treatment once a prisoner has been determined to be suicidal. This circuit has

consistently recognized a prisoner's established right to medical attention once the prisoner's suicidal tendencies are known. *See Williams*, 186 F.3d at 691 (recognizing implicitly that suicidal condition is serious medical condition which requires medical attention and relying on *Estelle*, 429 U.S. at 105-06, for principle that "the right at issue is [prisoner's] right not to have his serious medical needs treated with deliberate indifference"); *Horn*, 22 F.3d at 660 (recognizing that prisoner's psychological needs may constitute serious medical needs which require medical attention, especially when they result in suicidal tendencies); *Danese*, 875 F.2d at 1244 (noting that if officials have knowledge that prisoner is suicidal, they cannot ignore his needs).

Based on case law from the Supreme Court and our circuit, we conclude that a reasonable prison psychologist in 1995 "would have clearly understood that [he] was under an affirmative duty" to offer reasonable medical care to a prisoner whom he knew to be suicidal, in the circumstances confronted by McCrary. *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1095 (6th Cir. 1992). Because, viewed in the light most favorable to plaintiff, McCrary's conduct violated Montgomery's constitutionally protected right to medical care for his serious medical needs under the Eighth Amendment, and the constitutional right was clearly established such that a reasonable official, at the time McCrary acted, would have understood that his behavior violated that right, we **AFFIRM** the district court's denial of summary judgment with respect to McCrary.

B. Defendant-Appellant Howell

As noted earlier, to establish that Howell violated Montgomery's clearly established right to medical treatment, plaintiff must put forward facts which would show that Howell was deliberately indifferent to Montgomery's health and safety. Plaintiff is unable, however, to allege facts from which we could conclude that Howell subjectively perceived "a substantial risk of serious harm" to Montgomery's health and safety. Of course, Montgomery was presumptively suicidal

because he was on suicide watch. Plaintiff, however, must do more than put forward facts that would show that Howell, the physician's assistant, perceived Montgomery to be suicidal. Even if he was aware that Montgomery was suicidal, Howell would not have perceived that Montgomery posed a substantial risk of harm to himself while on suicide watch. During Howell's physical examination, Montgomery was in close observational status and dressed in a suicide prevention garment. Montgomery had been stripped of his personal clothing, limited to finger foods, and was checked on every ten minutes; all sharp objects had been removed from his surroundings. It is simply impossible for us to conclude that Howell perceived a substantial risk that Montgomery would commit suicide when he observed Montgomery in these circumstances. Thus, plaintiff has failed to put forward facts that would demonstrate that Howell was aware of a substantial risk of serious harm to Montgomery, i.e., that Montgomery actually would, or could, inflict serious harm to himself while on suicide watch.

In other words, even if he subjectively perceived that Montgomery was suicidal, Howell had no way of knowing that McCrary would remove Montgomery from suicide watch shortly after the physical examination and thus that Montgomery would have the opportunity to carry through on any perceived suicidal intentions. Howell played no part in McCrary's decision to remove Montgomery from suicide watch. Although Howell recorded his observations of Montgomery in a brief progress note, the record is clear that McCrary failed to consult this progress note before deciding to remove Montgomery from suicide watch. In addition, we cannot conclude that Howell's progress note evidences deliberate indifference to Montgomery's health or safety. The progress note merely records what Montgomery said to Howell regarding why he was on suicide watch and notes, "No psychotic signs/symptoms noted." J.A. at 62. Plaintiff's theory is that Howell should have done more than record his observations -- that once Howell was aware that Montgomery

had been labeled a "snitch" by other prisoners, he should have taken additional steps to protect Montgomery from himself. Given that Montgomery was already on suicide watch, however, there was nothing more Howell reasonably should have done to secure Montgomery's health and safety.

Because plaintiff has failed to put forward any facts demonstrating that Howell subjectively perceived a substantial risk that Montgomery would harm himself, we **REVERSE** the district court's order denying Howell's motion for summary judgment based on qualified immunity.

C. Defendant-Appellant Thyagarajan

Plaintiff attempts to overcome Thyagarajan's qualified immunity by asserting that he displayed deliberate indifference to Montgomery's medical needs by failing to properly supervise Howell. "This court has held that § 1983 liability must be based on more than respondeat superior, or the right to control employees." *Shehee*, 199 F.3d at 300. The supervisor is not liable for failing to supervise the offending employee unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Id.* (quoting *Hays v. Jefferson Cty.*, 688 F.2d 869, 874 (6th Cir. 1982)). If Howell did not violate Montgomery's clearly established right to medical treatment, then Thyagarajan is entitled to qualified immunity because he did not "implicitly authorize[]" or "knowingly acquiesce[]" in any unconstitutional conduct. Therefore, the district court's decision with respect to Thyagarajan must also be **REVERSED**.

IV. State Law Claims

Because the district court will maintain jurisdiction over at least one federal cause of action, we decline to decide the defendants' state law claims.

CONCLUSION

For the foregoing reasons, we **AFFIRM** in part and **REVERSE** in part the district court's judgment, and **REMAND** for further proceedings.

DISSENT

KATHLEEN McDONALD O'MALLEY, District Judge, dissenting. Although the majority's opinion is generally well-reasoned and certainly well-written, I must respectfully dissent because I believe we do not have jurisdiction in this case. As the majority notes, "factual issues were contested before the district court," op. at 8, and, when the district court denied the defendants' motion for summary judgment based on qualified immunity, it "fail[ed] to make findings of fact," *id.* at 8 n.3. Thus, the factual record on appeal is, at best, unsettled and incomplete. The Supreme Court has ruled that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the trial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). Accordingly, I believe we do not have jurisdiction over this appeal.

The majority avoids the jurisdictional hurdle by stating that, "for the purposes of this appeal, both parties have explicitly stipulated to plaintiff's version of the facts." Op. at 8. I believe the defendants' "stipulation" in this case is no jurisdictional cure. First, defendants' "stipulation" appears overly convenient. Earlier, the defendants stipulated in district court that the court's order denying the motion for summary judgment based on qualified immunity was unobjectionable "both as to form and content." Joint Appendix at 251. In essence, defendants stipulated below that there were material facts in dispute precluding a finding of qualified immunity. How can defendants now propose to stipulate on appeal that those same facts mandate a finding of qualified immunity?

Second, despite their latest "stipulation," the defendants' version of certain facts clearly does not "concede the best view

of the facts to the plaintiff." *Booher v. Northern Kentucky University Bd. of Regents*, 163 F.3d 395, 396 (6th Cir. 1998). For example, plaintiff asserts that defendant Howell *did* subjectively perceive Montgomery's risk of suicide if *released* from suicide watch. *Cf.* op. at 26 ("[e]ven if he was aware that Montgomery was suicidal, Howell would not have perceived that Montgomery posed a substantial risk of harm to himself *while on suicide watch*") (emphasis added). In his appellate brief, Howell does not merely fail to concede this, he disputes it, and acknowledged this dispute at oral argument. Simply, defendants seek to stipulate to a set of facts in an effort to justify appellate review while steadfastly refuting the inferences plaintiffs assert can and should be drawn from those facts. Without an "unqualified concession" on *all* issues of fact, however, we do not have jurisdiction over "an interlocutory appeal from the denial of qualified immunity." *Id.* at 396-97.

Clearly, all questions presented by this appeal, including the jurisdictional ones, would have been easier if the district court had issued an opinion delineating those facts upon which it relied in rendering judgment. I believe, however, that the district court correctly concluded, as the parties then agreed, that material facts relevant to qualified immunity are in dispute. And, I believe that defendants' appellate "stipulation" does nothing to alter this fact. Accordingly, I believe we should dismiss this appeal for lack of jurisdiction and revisit these issues, if at all, after a full development of the record. This course would allow us to rely on a fact-finder's inferences, rather than our own. For these reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-2448

Filed
Dec 12 2001
Leonard Green,Clerk

CARYLYN COMSTOCK,
Plaintiff-Appellee,

v.

NORRIS, MCCRARY, V.S. THYAGARAJAN; and DAVID HOWELL,
Defendants-Appellants,

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; and O'MALLEY, District Judge.

JUDGMENT

On appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court as to defendant Norris McCrary is AFFIRMED, and the judgment as to defendants David Howell and V.S. Thyagarajan is REVERSED. IT IS FURTHER ORDERED that the case is REMANDED for further proceedings in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROLYN COMSTOCK, individually
and as Personal Representative of the
ESTATE OF BILLY WADE MONTGOMERY,

Plaintiff,

V

Case No. 97-74806
Hon. Anna Diggs Taylor

NORRIS McCRARY, individually,
V.S. THYAGARAJAN, M.D., individually,
and DAVID HOWELL, individually,

Defendants.
_____/

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STIPULATION AND ORDER REGARDING

MOTIONS FOR SUMMARY JUDGMENT

At a session of said Court, held in the United States District Court, City of Detroit, County Wayne, on the 16 day of August, 1999.

PRESENT: Hon. Anna Diggs Taylor
United States Eastern District Court

Consistent with the stipulation set forth below, and Defendants Howell and Thyagarajan's Motions for Summary Judgment having come on for hearing, the parties involved by and through their respective counsel having appeared in open court and made their arguments for the record, and this Court being fully advised in the premisis,

IT IS ORDERED that Defendant Howell's Motion for Summary Judgment against Plaintiff on Count II of Plaintiff's Second Amended Complaint (violation of Eighth Amendment – denial of basic and essential medical care) and Count IV of Plaintiff's Second Amended Complaint (gross negligence) are Denied for the reason that genuine issues of material fact exist with respect to Plaintiff's claim of deliberate indifference and gross negligence on the part of Defendant Howell.

IT IS FURTHER ORDERED that Defendant Thyagarajan's Motion for Summary Judgment against Plaintiff, on Count II of Plaintiff's Second Amended Complaint (violation of Eighth Amendment – denial of basic and essential medical care) is Denied for the reason that genuine issues of material fact exist with respect to Plaintiff's claim of deliberate indifference on the part of Defendant Thyagarajan.

IT IS FURTHER ORDERED that Defendant Thyagarajan's and Defendant Howell's Motions for Summary Judgment on Count II of Plaintiff's Second Amended Complaint (violation of Eighth Amendment – denial of protection of assaultive inmates) is Granted.

_____

Hon. Anna Diggs Taylor

Dated: _____

We the undersigned hereby stipulate to the entry of the above order, both as to form and content.

_____	_____
David E. Lesz	John Thurber
Attorney for Plaintiffs	Attorney for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROLYN COMSTOCK, individually
and as Personal Representative of the
ESTATE OF BILLY WADE MONTGOMERY,

Plaintiff,

V

Case No. 97-74806
Hon. Anna Diggs Taylor

NORRIS McCRARY, individually,
V.S. THYAGARAJAN, M.D., individually,
and DAVID HOWELL, individually,

Defendants.
_____/

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_____/

STIPULATION AND ORDER REGARDING

MOTIONS FOR SUMMARY JUDGMENT

At a session of said Court, held in the United States District Court, City of Detroit, County Wayne, on the 6 day of July, 1999.

PRESENT: Hon. Anna Diggs Taylor
United States Eastern District Court

Consistent with the stipulation set forth below, and the parties' Motions for Summary Judgment having come on for hearing, the parties involved by and through their respective counsel having appeared in open court and made their arguments for the record, and this Court being fully advised in the premises,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment against Defendant McCrary, on Count II of her Second Amended Complaint (violations of Eighth Amendment – denial of the basic and essential medical care) and Count IV of her Second Amended Complaint (state law claim – gross negligence) and Defendant McCrary's Motion for Summary Judgment on Count II of Plaintiff's Second Amended Complaint and Count IV of Plaintiff's Second Amended Complaint are Denied for the reason that genuine issues of material fact exist with respect to Plaintiff's claim of deliberate indifference and gross negligence on the part of Defendant McCrary.

IT IS FURTHER ORDERED that Defendant McCrary's Motion for Summary Judgment on Count II of Plaintiff's Second Amended Complaint is Denied with respect to Defendant McCrary's claim of qualified immunity.

IT IS FURTHER ORDERED that Defendant McCrary's Motion for Summary Judgment of Count III of Plaintiff's Second Amended Complaint (violation of Eighth Amendment – denial of protection of assaultive inmates) is Granted.

_____
Hon. Anna Diggs Taylor

Dated: _____

We the undersigned hereby stipulate to the entry of the above order, both as to form and content.

_____
David E. Lesz
Attorney for Plaintiffs

_____
John Thurber
Attorney for Defendants

99-2448

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARYLYN COMSTOCK, PERSONAL REPRESENTATIVE OF THE ESTATE OF BILLY WADE MONTGOMERY,	)	Filed Feb 15 2002 Leonard Green, Clerk
Plaintiff-Appellee,	)	
v.	)	ORDER
NORRIS, MCCRARY, ET AL.,	)	
Defendants-Appellants,	)	

BEFORE: MARTIN, Chief Judge; MOORE, Circuit Judge; and O'MALLEY*, District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been transferred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Kathleen O'Malley United States District Judge for the Northern District of Ohio, sitting by designation.

Judge O'Malley would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROLYN COMSTOCK, individually and as Personal Representative of the ESTATE OF BILLY WADE MONTGOMERY,

Plaintiff,

File No. 97-74806
-vs-
HON. ANNA DIGGS TAYLOR

NORRIS McCRARY, individually, V.S. THYAGARAJAN, M.D., individually, and DAVID HOWELL, individually,

Defendants.

CONTINUED DEPOSITION

of NORRIS McCRARY, a Defendant called by Plaintiff, taken

before Ursula Wegert, Certified Shorthand Reporter and Notary

Public, at 3855 Cooper Street, Jackson, Michigan, on Friday,

October 2, 1998, noticed for the hour of 1:00 p.m.

APPEARANCES:

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By
DAVID E. LESZ, J.D.

On behalf of the Plaintiff.

BARBARA A. SCHMIDT, J.D.
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On behalf of the Defendants.

other inmates to the authorities?

A. No, sire, I did not.

Q. Okay. Was, when Montgomery was in the suicide of the close observation cell, did he make any complaints that he wanted out of there because of his inconvenience or was

uncomfortable, meaning he didn't like being in the bam-bam suit, he didn't like eating finger foods, he thought it was boring being locked up all the time and that?

A. I don't really - - I can't recall him saying that. All I can tell you, sir, is when I saw Mr. Montgomery on the 3rd of March, my main concern was, was he still fairly suicidal or not. And I still again asked him if he had a problem with any of the other prisoners, which he told me no. And he said he was not feeling suicidal, that he didn't feel like he was going to die. I asked him some other questions to ascertain his mental status, just to make sure that he was okay. He seemed to be fine, and know that he was going to go back up to top six. I don't recall him saying any statements that he was tired of being in a bam-bam suit or tired of the finger foods or anything like that.

Q. Okay. If you know that Montgomery felt threatened of physical - - assuming you knew that he felt that there was a threat of physical violence against him by other inmates or whoever the case may be, someone in the prison, would it surprise you that he ultimately committed suicide?

In The Matter Of:

CAROLYN COMSTOCK v.
NORRIS McCRARY, V.S. THYAGARAJAN, M.D.

DAVID AULD HOWELL
September 28, 1998

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had never said that Mr. Montgomery conveyed to him that he was having thoughts of suicide and I just wanted to clear that up. And I'm not sure that David caught that when he said that.

THE WITNESS: He denied to me that he was suicidal. I mean, he was relating to me a rational process for moving from one part of the prison facility to another part of the prison facility. And he was very adamant about the fact that he was not suicidal.

BY MR. LESZ, CONTINUING:

Q: I'm looking at a document dated March 10th, 1995. It appears to be a memorandum from yourself to Deputy Warden Pogats, P-o-g-a-t-s.

A: Right.

MR. LESZ: We'll get it marked as an exhibit.

(Deposition Exhibit No. 1 marked for identification)

BY MR. LESZ, CONTINUING:

Q. I've marked a document I just identified previously as Howell Exhibit No. 1.

Is that the memorandum that I described?

A: May I take a moment to read it?

AUG 12 2002

No. 01-1698

IN THE

Supreme Court of the United States

NORRIS McCRARY,

Petitioner,

v.

CAROLYN COMSTOCK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Mr. McCrary, a prison psychologist placed Mr. Montgomery on suicide watch on March 2, 1995. Mr. McCrary removed Mr. Montgomery from suicide watch on March 3, 1995 in violation of the DOC policy directive regarding suicide prevention and without exercising professional judgment. Within several hours of being removed from suicide watch, Mr. Montgomery committed suicide in his jail cell by hanging himself.

Did the Court of Appeals err in affirming the decision of the District Court denying Mr. McCrary qualified immunity because Mr. McCrary was deliberately indifferent to the serious medical needs of Mr. Montgomery in violation of Mr. Montgomery's Constitutional rights?

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STATEMENT OF THE CASE

There are additional facts, omitted by the Petitioner, that are crucial to a complete understanding of the case and the Opinion of the 6th Circuit Court of Appeals. Mr. Montgomery, who was twenty-nine (29) years old, was sentenced on June 28, 1994 to one to five years and spent a substantial portion of his sentence in the county jail before arriving at the Reception and Guidance Center ("RGC") at the State Prison of Southern Michigan. His earliest possible release date was April 11, 1995.

On March 2, 1995, at approximately 10:55 a.m., Defendant McCrary, a prison psychologist, received a referral to see Mr. Montgomery, because Mr. Montgomery had expressed thoughts of suicide. During Mr. McCrary's meeting with Mr. Montgomery, Mr. Montgomery indicated that he wanted to kill himself. Mr. McCrary recommended that he be placed on close observational status (suicide watch).

Mr. McCrary testified that he removed Mr. Montgomery from close observational status without ever: 1) reviewing Mr. Montgomery's institutional file or medical record (which contained Defendant Howell's note regarding Mr. Montgomery's "snitch" label); 2) speaking to the custody staff member who requested the psychological referral; 3) consulting with Defendant Howell; 4) speaking with Top 6 custody staff regarding their observations of Mr. Montgomery; 5) checking the log book entries kept by the RGC control center or the Top 6 log book; 6) reviewing a battery of routine psychological tests conducted on February 27, 1995 which included: a) an MMPI-2 (Minnesota Multiphasic Personality Inventory), Draw-A-Person, Symbol Digit Modality Test, Bender-Gestalt, Rotter Incomplete

Sentences Blank, and the TABE Educational Locator Test; 7) speaking with other DOC psychologists that Mr. McCrary learned had met with Mr. Montgomery previously; or 8) allowing the Outpatient Mental Health Team to conduct an evaluation — as requested by Mr. McCrary just one day earlier. In doing this, Mr. McCrary violated DOC policy directive 04.06.115 regarding suicide prevention by: 1) failing to review the custody staff referral form CHX-2 12 (Roberta R) or alternatively, speaking with the custody officers who referred Mr. Montgomery to him; 2) failing to complete an evaluation of suicide risk prisoners (form CHJ-180) and to review Mr. Montgomery's institutional file and health record; and 3) failing to complete a written health record (progress note) when moving Mr. Montgomery from close observation.

Had Mr. McCrary conducted even a simple and routine investigation into the reasons behind Mr. Montgomery's suicidal ideation, he would have learned that: Mr. Montgomery had been labeled a snitch and was being threatened by other inmates; Mr. Montgomery told custody staff that the other inmates were going to kill him; Mr. Montgomery refused to leave his cell; Mr. Montgomery had been seen by two other RGC psychologists; and the results of Mr. Montgomery's MMPI.

Brian Smith, a DOC psychologist and Mr. McCrary's peer, conducted a suicide autopsy shortly after Mr. Montgomery's suicide. He found that on March 2, 1995 at 10:55 a.m., custody officer Mark Kurpenski asked Mr. McCrary to see Mr. Montgomery. Apparently, Mr. Kurpenski observed 1) Mr. Montgomery as being despondent and 2) indicated that the previous third shift officers had removed some potentially lethal items from Mr. Montgomery's cell over concerns for his safety.

Mr. Smith's report concluded that based upon a review of information contained in the record and information gleaned from discussion with staff, Mr. Montgomery's suicide was "motivated out of fear and a desperate desire to regain an illusion of self-control". (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 7, p. 3). According to Mr. Smith's report, "hearsay and documented evidence suggests that he succumbed to the mental abuse and insidious manipulation of other inmates occupying nearby cells, who threatened to harm Mr. Montgomery at first opportunity. Somewhere along the line he was identified as a snitch." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 7, p. 3). Mr. Smith concluded that Mr. Montgomery did not "have the personal resources to effectively cope with the stressors of this environment." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 7, p. 3).

This suicide autopsy included a review of: 1) Mr. Montgomery's medical file; 2) Mr. Montgomery's institutional file; 3) the Control Center logbook and the Top 6 logbook; and 4) interviews with staff. (R. 41, Brief in Support of Plaintiff's Motion for Summary Deposition. Exhibit 12, Deposition of Brian Smith, pp. 11- 13.) All of this information that was available to Mr. McCrary prior to his decision to remove Mr. Montgomery from close observation.

Dr. Robert Walsh, Administrator of Psychological Services for the Jackson Clinical Complex (Bureau of Health Care Services for the Department of Corrections)[1], testified

---

1. On March 3, 1995, Dr. Walsh supervised McCrary's supervisor, Dr. Bruce Wright, clinical supervisor/chief psychologist for the Central Complex general population.

at deposition. While Dr. Walsh agreed with Mr. McCrary's assessment that Mr. Montgomery was a moderate suicide risk, he unequivocally testified that middle range suicidal behavior/risk, like that exhibited by Mr. Montgomery, is the most difficult, intensive and time consuming to diagnose because it is the hardest to sort out. Dr. Walsh added that clinicians needed to be extra aware of people in that position as they can rapidly shift in either direction due to pressure from the environment.

Dr. Walsh testified that he gathers as much information as possible prior to conducting an evaluation, so that a thorough and comprehensive evaluation may be completed. In particular, Dr. Walsh testified that he would: 1) view the inmate's file; 2) talk with custody officers; 3) look at the MMPI in every case because: (a) it is the "best single psychological test that we have", (b) it gives a comprehensive picture of the inmate's mental health status, and (c) it is one of the more important sources of information available (Dr. Walsh stated that he has an expectation that Mr. McCrary would review the results of the MMPI); 4) review the logbooks; and 5) interview the inmate to compare what he is saying to what he said the day before.

Dr. Walsh explained the critical nature of this information. Dr. Walsh stated that he simply would not feel comfortable taking an inmate off close observation without reviewing all available information. Specifically, he would never take an inmate off close observation without reviewing the medical file because he would not want to miss anything that might affect his decision. Second, he would talk to custody officers, which he stated is done routinely, because they provide valuable behavioral observations unavailable through a simple interview with the inmate. As an inmate

might not be totally forthright in his responses to important questions posed during the interview, the best material comes from a separate observer. Dr. Walsh would want to know the reasons behind the inmate referral to the psychologist. In sum, Dr. Walsh stated that it is "inconceivable" that he would not get all of the above information if it were available.

Brian Smith testified, at deposition, that: 1) it is important for the treating psychologist to know that a patient has been described as "despondent" and that custody staff removed potentially lethal items from inmate's cell; 2) a psychologist would want to know what custody staff observed and would want to get as much information as possible; 3) it is "routine" to talk to custody officers in the cellblock regarding their observations of the patient; 4) the MMPI provides the psychologist helpful information; and 5) it is helpful to review the medical file, and, in fact, Mr. Smith never released an inmate from close observational status without at least reviewing the medical file. Finally, Brian Smith testified that everything he reviewed while conducting the suicide autopsy could have been reviewed by Mr. McCrary.

Both Dr. Walsh and Brian Smith testified that the fear might be so overwhelming that an inmate may choose suicide. Dr. Walsh even went as far as to say that fear, a very real thing at RGC, may cause someone who otherwise might not be suicidal to become suicidal. Brian Smith concurred in this observation.

The Respondent's expert, Dr. Gerald Sheiner, testified at deposition that Mr. McCrary failed to make an adequate assessment of Mr. Montgomery's suicide risk and ignored obvious and glowing factors in a very cavalier manner.

He stated that Mr. McCrary's note that "I took him at his word" demonstrates the cavalier manner Mr. McCrary employed in making an assessment of suicide risk. Mr. McCrary simply ignored the obvious. He stated that Mr. McCrary's evaluation was "grossly inadequate" and that he used none his professional skills in making the assessment. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 15, p. 69).

REASONS FOR DENYING THE WRIT

McCrary has not presented any compelling reason for this Court to exercise discretionary jurisdiction over his appeal of the denial of his claim to governmental immunity. Mr. McCrary seeks review of an alleged misapplication of a properly stated rule of law.

This Court should deny certiorari because the holding of the Court of Appeals is consistent with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994).

A. Mr. McCrary's actions violated Mr. Montgomery's Constitutional rights under the Eighth Amendment.

The law is clearly established that government officials are not immune from liability "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate constitutional rights of the plaintiff". *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). The defendant has the burden of showing that he was performing discretionary acts for which the qualified immunity defense is available. *Poe v. Haydon*, 853 F.2d 416 (6th Cir. 1988). The qualified immunity defense is not available if it is shown that the

defendant violated clearly established law that he should have known about. Whether the law was clearly established is a legal question for the court to determine. *Heflin v Steward County, Tenn.*, 958 F.2d 709, 717 (6th Cir. 1992); *Anderson v Creighton, supra.*

Mr. McCrary asserts before this Court, as he did before the Court of Appeals that because he rendered medical treatment, he is entitled to governmental immunity. This argument is a misstatement of the applicable law and is contrary to the cases and analysis cited in his own Petition. This Court recognized in *Estelle, supra*, that a response to the serious medical needs of an inmate could constitute deliberate indifference.

The test for qualified immunity does not turn on the subjective good faith of the official, but rather turns on the "objective legal reasonableness of the action, assessed in light of legal rules clearly established at that time." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819 (1981). It would not make any sense to permit a prison official who deliberately ignored the serious medical needs of an inmate to claim that it would not have been apparent to a reasonable person that such actions violated the law. *See Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992) ("A finding of deliberate indifference necessarily precludes a finding of qualified immunity.")

"Where prison officials are so deliberately indifferent to the serious medical needs of prisoners as to unnecessarily and wantonly inflict pain, they impose cruel and unusual punishment in violation of the Eighth Amendment." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994). *Estelle v. Gamble, supra.*

In *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811 (1994), this Court held that deliberate indifference requires that "the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*, 114 S. Ct. at 1978. Under this standard, "an official's failure to alleviate a significant risk that he should have perceived but did not" cannot be considered a violation of the Eighth Amendment. *Id.* If a prison official knows of a substantial risk of harm, but the harm occurs anyway, the official is not liable if he responds reasonably to that risk. *Id.*, 114 S. Ct. at 1982-83. If an Eighth Amendment plaintiff presents evidence showing that a substantial risk was longstanding, pervasive, well-documented, or expressly noted by the prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus, 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk. *Id.* 114 S. Ct. at 1982.

This Court in *Farmer* adopted the subjective test, reasoning that "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment" in violation of the Eighth Amendment. *Id.* 114 S. Ct. at 1979. The Court stated that all federal courts agree that deliberate indifference is more than mere negligence and less than actual intent. *Id.* 114 S. Ct. at 1970.

The Court outlined a three part inquiry for determining qualified immunity as: (1) did a Constitutional violation occur; (2) was the right that was violated a clearly established

right of which a reasonable person would have known; and (3) did the plaintiff allege sufficient facts, supported by evidence, to indicate that what the official did was objectively unreasonable in light of the clearly established Constitutional right. *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999).

In *Williams v. Mehra, supra*, the Court, in finding the Plaintiff failed to show deliberate indifference, said "[t]here is nothing to suggest that the doctors were failing to treat Wade or doing less that their training indicated was necessary." The action complained of was the failure of the doctors to change medication from tablets, which Wade was known to hoard and use to try to commit suicide, to liquid. To minimize the chances that Wade would be able to hoard the pills, they were distributed to him in a pill-line where a nurse would watch him take the medication. There is no question that Wade was being treated and treated in a manner, by use of the pill line, that demonstrated an appreciation for the risk that he would commit suicide and do so by hoarding medication.

While the principles are applicable, *Williams* is easily factually distinguishable from the situation before this Court involving Mr. Montgomery. The crux of the complaint is that Mr. McCrary failed to treat Mr. Montgomery and did less than his training indicated was necessary. Mr. McCrary disregarded DOC policy regarding suicidal inmates and did not properly treat or investigate Mr. Montgomery's condition and mental state. **McCrary admitted that he did not properly investigate Mr. Montgomery's case due to workload pressures.** (R. 63, Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment Based on Qualified Immunity, Exhibit 1, Deposition of Norris McCrary, pp. 228-233). Dr. Walsh even stated "it's

inconceivable" that he would not get all the information that was available to McCrary to assess Mr. Montgomery's suicidal risk/intent.

Mr. Montgomery demonstrated to Mr. McCrary a strong likelihood that he would attempt to take his own life. Mr. McCrary admits that he subjectively perceived the risk of suicide. Specifically, Mr. McCrary's progress note dated March 2, 1995 states:

> Inmate reports feeling depressed. Stated that he last thought of suicide on 3/1/95 at HS . . . Stated that his nerves are shot and that he "feels like he's going to die" . . . Currently, Inmate reports feeling suicidal but with no specific plan. Lethality however appears to be moderate. Recommend inmate be placed on close observation in a Bam-Bam suit (suicide prevention garment) and finger foods. . .[2]

(R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 2).

Deliberate indifference can be inferred when a decision substantially departs from accepted medical judgment and it can be demonstrated that the decision was not based on

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2. According to Defendant Howell, McCrary failed to include his March 2, 1995 progress note in the medical file. Defendant Howell testified that if McCrary had included his progress note in the file, then he would have taken a different approach with Mr. Montgomery on March 3, 1995. In particular, he would have questioned Mr. Montgomery more carefully, and contacted McCrary with his findings. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 4, pp.131-133).

accepted medical judgment. *Sanville v. McCaughtry*, 266 F.3d 724 (2001); *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

It is Mr. McCrary's failure to take any precautions prior to removing Mr. Montgomery from close observation on March 3, 1995 that demonstrates a deliberate indifference to the subjectively perceived mental health needs of Mr. Montgomery. Specifically, Mr. McCrary's "evaluation" and investigation of Mr. Montgomery's mental health — prior to removing him from close observational status on March 3, 1995 — consisted of nothing more than a short interview through a door which lasted less than one half of an hour. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 166). This interview framed the basis of Mr. Montgomery's removal from close observation.

Mr. McCrary explained that he took Mr. Montgomery "at his word that he wasn't feeling suicidal" on March 3, 1995. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 97; R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 5, Logbook entry dated March 3, 1995). Mr. McCrary's failure to conduct any investigation and simply taking Mr. Montgomery at his word is perhaps most troubling because Mr. McCrary admits that an inmate may lie to a psychologist so that he may carry out a suicide. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 85, 86). Mr. McCrary admits that he is not surprised that Mr. Montgomery was less than forthcoming on March 2, 1995 when Mr. McCrary inquired into whether other inmates were "pressing" him. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 192, 193).

Mr. McCrary also deliberately ignored fundamental, basic, and essential sources of critical information regarding Mr. Montgomery's mental health. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 115, 117, 157, 158, 159-161, 169).

The voluminous record in this case, including Mr. McCrary's own testimony, reveals that absent Mr. McCrary's reckless indifference to Mr. Montgomery's serious mental health needs, Mr. Montgomery would likely have made it out of the RGC alive. Mr. McCrary in failing to review the available records, failed to discover that Mr. Montgomery was being threatened by other inmates, and, in fact, had been labeled a "snitch" by other inmates. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition).

Every witness deposed in this case testified that the snitch label carries a dubious and onerous distinction for an inmate. Defendant David Howell testified that snitches are sometimes targets for retaliation and retribution and that the snitch label can put an inmate in peril. Brian Smith stated that inmates who are labeled snitches are targeted. Mr. McCrary stated that "a prisoner definitely does not want to be labeled a snitch, that's probably the worst label that you can — could have put on you if you were in prison." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 179).

Dr. Walsh testified that he would want to know about the 'snitch' label. He stated that the mere fact that Mr. Montgomery perceives it is significant. Thus, he would need to gauge the severity and extent of his reaction to it in terms of protecting himself because such a label may compel

him to commit suicide. Dr. Walsh acknowledged the possibility that an inmate would commit suicide based on threats from other inmates. Dr. Walsh would want to address this fear because prisons are a "very hostile, negative, negatory — type place." "It's scary for someone who hasn't been in there before and a lot of prisoners are scared. It's common." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 16, pp. 93, 94).

Mr. McCrary testified that he felt that "it's a good chance that he [Mr. Montgomery] could have made it out of the prison alive" if Mr. Montgomery were placed in protective custody. He stated that "had he been on close observational status, there's a good chance he could have left prison alive". (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 204). Mr. McCrary also stated that if he knew that Mr. Montgomery were being pressed, called a snitch, and had reported, "They are going to kill him", he would not have removed him from close observational status on March 3, 1995 because he would have determined him to be a suicide risk. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 206, 207, 248).

The record unequivocally demonstrates that Mr. McCrary subjectively perceived the risk of suicide on March 2, 1995; but failed to take adequate precautions to ascertain the reasons behind Mr. Montgomery's suicidal ideation. Mr. McCrary deliberately ignored sources of critical information because of his busy work schedule. Mr. McCrary consciously made the decision not to review the available information, which would have confirmed Mr. Montgomery's suicidal ideation. Mr. McCrary himself, admits that if he had the critical information, which he would have if he had not intentionally ignored it, he would have made a different decision and

Mr. Montgomery likely would have made it out of RGC alive. Instead, he merely relied upon Mr. Montgomery's representations, made less then twenty-four hours later, that he was no longer suicidal. As a result, with deliberate indifference Mr. McCrary removed Mr. Montgomery from close observation.

In doing so, McCrary failed to provide the adequate level of care. McCrary failed to utilize any of the critical resources at his disposal that undoubtedly and admittedly would have revealed the motivation behind Mr. Montgomery's suicidal ideation. As a result of McCrary's failure to exercise professional judgment and his reckless and deliberate indifference, Mr. Montgomery "succumbed to the mental abuse and insidious manipulation of other inmates occupying nearby cells, who threatened to harm Mr. Montgomery at first opportunity".

Dr. Walsh and Mr. Smith testified extensively at deposition of the actions that Mr. McCrary should have taken, in order to exercise accepted medical judgment in the evaluation of Mr. Montgomery. They each testified concerning the availability of documentation accessible to Mr. McCrary that would have been invaluable in evaluating Mr. Montgomery. Dr. Walsh even went as far as to testify that it was inconceivable not to get information from the medical file and custody officers so that he could comfortably remove an inmate from suicide observation. Dr. Sheiner, the Plaintiff's expert, stated unequivocally that Mr. McCrary's evaluation of Mr. Montgomery was "grossly inadequate" and in making the assessment, Mr. McCrary used none of his professional skills.

This testimony alone establishes deliberate indifference on the part of Mr. McCrary to Mr. Montgomery's serious medical needs. There is sufficient evidence from which it could be determined that Mr. McCrary was deliberately indifferent to the serious medical needs of Mr. Montgomery. At the very least, a question of fact existed and denial of governmental immunity to Mr. McCrary was proper.

Mr. McCrary's response to the substantial risk of harm to Mr. Montgomery was not reasonable. As a result, he is subject to liability for his acts and/or omissions. *Farmer v. Brennan, supra.*

The Court of Appeals appropriately evaluated Mr. McCrary's claim for governmental immunity. The Court, applying the principles set forth in *Estelle, supra*, and *Farmer, supra*, looked at whether Mr. McCrary had subjective knowledge that Mr. Montgomery posed a serious risk of harm to himself. The Court concluded that the evidence, including Mr. McCrary's own admissions, established that Mr. McCrary knew that Mr. Montgomery posed a serious risk of harm to himself.

The Court then went on to evaluate whether the evidence demonstrated that Mr. McCrary disregarded the risk of serious harm. In doing so, the Court again applied the principles of *Farmer, supra*, and *Williams, supra*. The Court evaluated all of the evidence that was presented and admitted by Mr. McCrary and concluded that there was ". . . an abundance of evidence that McCrary did not respond reasonably to the substantial risk of harm . . ." (Petition for Writ of Certiorari, p 25a).

The analysis of the Court of Appeals was consistent with this Court's holdings in *Estelle*, *supra*, and *Farmer*, *supra*. The Court then went on to evaluate whether the law was clearly established.

B. Mr. McCrary acted in violation of clearly established law.

There are a number of ways to determine whether the law is clearly established. Supreme Court decisions may be a basis upon which to conclude that the law is clearly established. Lower court decisions in the jurisdiction is another basis for concluding that the law is clearly established. *Russell v. Coughlin*, 910 F.2d 72 (2d Cir. 1990). The law may be clearly established by decisions in analogous cases. It is not required that the exact facts of the case in question mirror prior court decisions. "For a right to be clearly established, it is not necessary that the very action in question have previously been held unlawful." *Jackson v. McIntosh*, 81 F.3d 112, 113-24 (9th Cir. 1996); *Yvonne L. v. New Mexico Dept. of Human Services*, 959 F.2d 883, 889 (10th Cir. 1992).

A prisoner has a clearly established right to treatment for his serious medical needs. *Estelle*, *supra*; *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). This clearly established right existed at the time that the Defendant in this case, Mr. McCrary, was acting.

The Court of Appeals assessed whether the law was clearly established so that Mr. McCrary could have understood that his conduct was in violation of the right to treatment. The Court, following the law promulgated by the Courts in *Estelle*, *supra*, *Williams*, *supra*, and *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001),

determined that the law was such in 1995 that a reasonable prison psychologist would have understood that he had an affirmative duty to provide reasonable medical care to Mr. Montgomery, who he knew was suicidal.

Mr. McCrary could have determined that his actions were unlawful or unreasonable. The fact that Mr. McCrary did not follow DOC policy directive 04.06.115 regarding suicide prevention combined with his accepting Mr. Montgomery at his word that he did not have a specific plan for killing himself are sufficient to establish liability. *Terrance v. Northville Regional Psychiatric Hospital*, 286 F.3d 834 (2002). In this case, we further have Mr. McCrary's peer, Mr. Smith, and supervisor, Dr. Walsh, indicating that Mr. McCrary's conduct was unreasonable. This is much more than Ms. Comstock asserting that there were other ways to care for Mr. Montgomery. The evidence supports that what Mr. McCrary did do was unreasonable, insufficient and substantially departed from accepted professional judgment so as to demonstrate that his decision was not based on professional judgment. *Sanville*, *supra*. As such, there is a violation of Mr. Montgomery's Eighth Amendment rights for which Mr. McCrary is liable.

The law is clear in requiring that Mr. McCrary do more than administer care to Mr. Montgomery to avoid liability. Clearly, Mr. McCrary had an obligation to act in conformance with the DOC policy directives and in conformance with accepted professional judgment. Mr. McCrary, as demonstrated herein, failed to act in conformance with the DOC policy directive regarding suicide prevention, failed to do what his peer and supervisor minimally expected for a person in his position and failed to act in conformance with accepted medical judgment to the extent that his decisions

reflected lack of judgment. Mr. McCrary's actions were a violation of a clearly established right and he knew his conduct was in violation of this right to treatment.

As the Court of Appeals opinion is in direct accord with Supreme Court precedent, this Court should deny the Petition for Certiorari and affirm the Court of Appeals.

CONCLUSION

For all of these reasons, Mrs. Comstock respectfully requests this Court to deny Certiorari and affirm the Court of Appeals.

Respectfully submitted,

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